NO. 89-909

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

SUZAN E. TAYLOR d/b/a EXPLORATION SERVICES,
Petitioner

v.

UNITED STATES OF AMERICA, THE FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver for MBANK HOUSTON, N.A., and BANK ONE, TEXAS, N.A.,
Respondents

BRIEF OF RESPONDENT BANK ONE, TEXAS, N.A., IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly ruled that the creation of a lien to secure a non-final judgment against a national bank by means of the Texas procedure for abstracting a trial court judgment is an attachment or injunction prohibited by 12 U.S.C. § 91.

2. Whether the Court of Appeals correctly ruled that the flat prohibition against attachments or injunctions against the property of national banks contained in 12 U.S.C. § 91 authorized the district court to enjoin a violation of that prohibition without analysis of the balance of harms or the public interest.

3. Whether the Court of Appeals correctly ruled that the United States had standing to seek an injunction against a violation of 12 U.S.C. § 91 on behalf of the Comptroller of the Currency because of the federal government's interest in the safety and soundness of the national banking system.

TABLE OF CONTENTS

TABLE OF CITATIONS

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STATEMENT

The statement contained in the Petition [by and large] correctly recites most of the facts necessary for this Court to consider and deny the Petition. Respondent BANK ONE, TEXAS, N.A., respectfully submits the following

statement to correct the few inaccuracies and omissions that are reflected in Petitioner's factual statement.

MBank Houston, N.A., timely filed a motion for new trial after entry of judgment in favor of Petitioner in the companion state court proceedings. On March 28, 1989, the Office of the Comptroller of the Currency declared MBank Houston, N.A., insolvent and appointed the Federal Deposit Insurance Corporation its Receiver. The Federal Deposit Insurance Corporation, acting in its capacity as Receiver for MBank Houston, N.A. ("FDIC-Receiver"), then removed the state court proceeding in which the judgment was entered to the United States District Court for the Southern District of Texas, where the motion for new trial is currently pending along with other matters. As the sole proper party defendant in that ongoing civil action separate and apart from this case, the FDIC-Receiver is pursuing the motion for new trial and otherwise seeking to overturn the judgment on the merits.

On the same day that it was appointed receiver, the FDIC-Receiver conveyed certain assets of the closed MBank Houston, N.A., to Deposit Insurance Bridge Bank, N.A., including all the real estate assets of the closed bank in Harris County, Texas. The bridge bank was created by the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. § 1821(i), as that subsection of the Federal Deposit Insurance Act then provided. The bridge bank has since been renamed BANK ONE, TEXAS, N.A., and will henceforth be referred to as BANK ONE.

Returning to the circumstances of this case, after entry of the preliminary injunction by the district court on March 21, 1989, ordering Petitioner to take "all necessary

steps" to withdraw her abstract of judgment, Petitioner filed on March 22 what she called a Notice Regarding Abstract of Judgment in the real property records of Harris County. The notice, however, merely mentioned the terms of the March 21 order, stated that Petitioner was making the filing involuntarily and advised that she would appeal the March 21 order. This notice, of course, had no practical effect on the abstract of judgment, so that BANK ONE found itself unable to convey clear title to the real estate that it had purchased from the FDIC-Receiver. After the FDIC-Receiver and BANK ONE substituted as parties for the closed bank, therefore, they were forced to seek further relief, which the district court ultimately granted, requiring Petitioner under threat of sanctions to release and effectively withdraw her abstract of judgment in Harris County.

SUMMARY OF REASONS FOR DENYING THE WRIT

The only conceivable reason for granting a writ in this case would be the importance of the questions of federal law raised in the petition. Because these admittedly important questions have long been settled by this Court and because the decision of the Court of Appeals in no way conflicts with the settled authority of this Court, however, there is in fact no reason for granting the writ.

1. This Court has long since established that the applicable provisions of 12 U.S.C. § 91 prohibiting attachments or injunctions against the assets of national banks are not to be read or applied literally, but are to be construed to fulfill the central purpose of that statute, which is to prevent creditors of national banks from

obtaining court-assisted preference over other creditors. The Court of Appeals faithfully followed this settled precedent in determining that the Texas procedure for creating a lien by abstracting a judgment—because it is the functional equivalent of an attachment, has the effect of an injunction, and is designed to secure a preferential lien on behalf of a judgment creditor—is a procedure that may not be applied against the assets of a national bank under 12 U.S.C. § 91.

2. It is settled law of this Court that if a statute contains a flat prohibition against certain conduct, a court may enjoin that conduct without analyzing the traditional factors of the balance of the harms or the effect on the public interest caused by such an injunction. Again the Court of Appeals faithfully applied this settled precedent in holding that the flat prohibition of 12 U.S.C. § 91 entitled the district court in this case to enjoin Petitioner from abstracting her judgment against the assets of a national bank without expressly analyzing the balance of harms or the public interest.

3. Because Respondents FDIC-Receiver and BANK ONE have standing to obtain and did obtain the critical relief that resulted in effective withdrawal of Petitioner's illegal abstract of judgment, the standing of the United States is a merely academic issue. In any event, it is well settled law of this Court that, even in the absence of express legislative authorization, the United States may have sufficient interest in a particular dispute to accord the federal government standing to seek an injunction against violations of federal law. The Court of Appeals followed this authority, as well as its own established precedent in this particular context, in ruling that the United States, acting on behalf of the Comptroller of

the Currency, has standing to seek to enjoin violations of 12 U.S.C. § 91 because of the federal government's interest in the safety and soundness of the national banking system.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals does not create a conflict in the circuits, and Petitioner does not contend that it does. Indeed, Petitioner's opening argument for granting the writ appears to be that this Court should always review decisions involving the FDIC. Petition, pp. 7-8. Of course, this has not been the judgment of this Court, for with respect to the Fifth Circuit's leading decision under 12 U.S.C. § 91—the most comparable case to the present case, although clearly of much wider significance —this Court has most recently denied certiorari. *United States v. LeMaire,* 826 F.2d 387 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 1223 (1988).

The questions of law posed by the Petition, especially as restated above, are clearly of great importance. Indeed, the current Congress considered the type of prohibition exemplified by 12 U.S.C. § 91 to be so important to the safety and soundness of the nation's banking and thrift systems that it enacted, as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, a nearly identical provision stating that "[n]o attachment or execution may issue by any court upon assets in the possession of the receiver." 12 U.S.C. § 1821(d)(13)(C) (referring to bank receiverships of the FDIC, and by reference, 12 U.S.C. § 1421A(b)(4), savings institution receiverships of the newly created Resolution Trust Corporation). Of equal importance is the principle that violations of these flat prohibitions against

court-assisted preferences for financial institution creditors may be and should be enjoined without express consideration of the balance of harms or the public interest. For these reasons, had the Court of Appeals reached decisions in conflict with the settled decisions of this Court on these two issues, BANK ONE would have been the first to argue that this case would be worthy of consideration by this Court.

As explained in detail in the following sections of this brief, however, the law of this Court relating to these issues is well settled. And the Court of Appeals did not depart in any manner from the controlling decisions of this Court on these subjects. Accordingly, there is no reason for this Court to review the decision of the Court of Appeals in this case. This Court should therefore deny the writ.

1. The Court Of Appeals Correctly Held Under Settled Precedent Of This Court That An Abstract Of Judgment Under Texas Law Is An Attachment Or Injunction Within The Meaning Of 12 U.S.C. § 91 That May Not Legally Be Employed Against The Assets Of A National Bank.

In *Third Nat'l Bank v. Impac Ltd., Inc.*, 432 U.S. 312 (1977), this Court analyzed the applicable provisions of 12 U.S.C. section 91 and reviewed the three other decisions of this Court which analyzed those provisions. *Van Reed v. People's Nat'l Bank of Lebanon*, 198 U.S. 554 (1905); *Earle v. Pennsylvania*, 178 U.S. 449 (1900); and *Pacific Nat'l Bank v. Mixter*, 124 U.S. 721 (1888). The *Impac* Court acknowledged that in its earliest construction of the statute in *Mixter*, the Court had reached

the conclusion that "the provision was evidently made to secure equality among the general creditors in the . . . property of an insolvent bank." 124 U.S. at 727, *quoted in Impac at* 432 U.S. at 319. Likewise, the *Impac* Court noted that the Court in *Earle* had reached a similar conclusion "that the ban on prejudgment writs must 'be construed in connection with the previous parts of the same section' concerning preferential transfers." 432 U.S. at 320, *quoting* 178 U.S. at 453. Finally, the *Impac* Court acknowledged that the "holding in *Earle* forecloses a completely literal reading of the statute." 432 U.S. at 320. It is therefore settled by this analysis in *Impac* that application of section 91 may not be limited to the literal remedies specified in the statute (and familiar to the Congress which enacted the statute in 1873), but must extend coverage of the statute so as to fulfill the underlying purpose of the "ban on prejudgment writs" by applying it to all such remedies that state legislators might devise which would assist bank creditors in gaining an unequal, preferential recovery against bank assets. *See United States v. LeMaire,* 826 F.2d 387, 389-90 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 1223 (1988).

The decision of the Court of Appeals in this case unquestionably follows this settled construction of section 91 and correctly applies it to the facts of this case. The Court of Appeals acknowledged first this Court's ruling in *Impac* "that section 91 is not to be given a completely literal meaning." Petition, A-5. Next the Court of Appeals correctly identified the purpose of section 91, "which is to prevent creditors from obtaining preferential treatment by court action, including the securing of a judgment at the trial-court level." Petition, A-5, *quoting LeMaire, supra,* 826 F.2d at 390. The Court of Appeals

had already determined that "under Texas law an abstract of judgment is functionally equivalent to an attachment" because they both create liens and "is also similar to an injunction in that the lien created by an abstract of judgment prohibits a national bank from freely transferring its property." Petition, A-5. It therefore concluded that, because by abstracting her judgment Petitioner "would secure preferential treatment over the other general creditors of MBank," her "action prior to a final judgment would violate" section 91. Petition, A-5-6. This conclusion in no way conflicts with applicable decisions of this Court.

Petitioner concedes the functional equivalency of an attachment and abstract of judgment by noting that "neither a writ of attachment nor a judgment lien seizes real property." Petition, p. 11. Petitioner, moreover, does not dispute that her action would have created a preference in her favor over the other general creditors of MBank in contravention of the purpose of section 91. Instead, Petitioner attempts to rely on the fact that creditors may obtain a preference through consensual liens or other consensual agreements. Petition, pp. 10-11. Section 91, of course, ~~does not~~ purport to prohibit consensual liens or consensual security agreements, unless those liens or agreements are undertaken in contemplation of insolvency. The lien sought by Petitioner was, however, not one of those consensual liens that are not prohibited by section 91. Her judgment lien would have been, for all practical purposes and under all policy considerations, identical to a prohibited attachment or injunction, as the Court of Appeals concluded.

In order not to conflict with the settled holding of this Court under section 91, therefore, the Court of Appeals had no choice but to rule that a Texas abstract of judg-

ment against a national bank is prohibited by section 91. There is no reason to grant the writ on the basis of the Court of Appeals' entirely proper ruling under 12 U.S.C. § 91.

2. The Court Of Appeals Correctly Held Under Settled Precedent Of This Court That The Flat Prohibition Of 12 U.S.C. § 91 Authorized The District Court To Enjoin A Violation Of The Statute Without Express Consideration Of The Balance Of Harms Or The Public Interest.

In *Amoco Production Co. v. Village of Gambell,* 480 U.S. 531 (1987), this Court reviewed the law governing the circumstances in which a district court may or should enjoin a violation of a federal statute, and acknowledged that in certain cases Congress may have "intended to deny courts their traditional equitable discretion." *Id.* at 543. The Court further acknowledged that its decision in *TVA v. Hill,* 437 U.S. 153 (1978), remained the leading precedent for the proposition that certain statutory violations must be enjoined without application of traditional equitable considerations. 480 U.S. at 543 n.9. There, as acknowledged by the Court in *Village of Gambell,* the Court concluded that the "flat ban on destruction of critical habitats" contained in the Endangered Species Act required a federal court to enjoin the construction of a dam that would have destroyed the habitat of the snail darter. *Id., citing TVA v. Hill, supra.* It is therefore settled by this Court that a flat statutory ban on certain conduct may require issuance of an injunction to block that conduct.

In this case, the Court of Appeals held that "the district court correctly concluded that the purpose of section 91

—to prevent a creditor from obtaining preferential treatment prior to a final judgment—requires injunctive relief once a statutory violation has been shown." Petition A-6-7. Again, this holding by the Court of Appeals in no way conflicts with settled precedent of this Court on this subject.

Petitioner simply ignores *TVA v. Hill,* and as noted above, likewise ignores the reasons for the statutory ban of section 91. Petition, pp. 13-14. There is simply no reason to grant the writ on this settled issue, on which the Court of Appeals scrupulously followed the leading decision of this Court.

3. The FDIC-Reciever And BANK ONE Had Undoubted Standing, And The Court Of Appeals Correctly Held Under Settled Precedent Of This Court That The United States Had Standing To Seek To Enjoin A Violation Of 12 U.S.C. § 91.

Because the FDIC-Receiver and BANK ONE had clear standing to obtain equitable relief against Petitioner and because these two Respondents appropriately obtained the effective relief forcing Petitioner to withdraw her abstract of judgment, the standing of the United States initially to have sought the same relief has clearly become a moot point. On this ground alone, the standing issue does not warrant this Court's review.

In any event, decisions of this Court have long established that the United States has standing in a variety of circumstances to obtain equitable relief when interests of the federal government are at stake. *In re Debs,* 158 U.S. 564, 584 (1885). Of course, as this Court held in *United States v. San Jacinto Tin Co.,* 125 U.S. 273 (1888), the United States does not have standing to

pursue purely private interests. The holding in *San Jacinto Tin* does not govern this case, however, as the Court of Appeals correctly held. In this case, the United States pursued, on behalf of the Comptroller of the Currency, the public's interest in a sound national banking system through enforcement of a key provision of the National Banking Act. The Court of Appeals could not question the standing of the United States on these grounds. Petition, A-3. There is nothing in this conclusion that justifies review by this Court.

CONCLUSION

For the foregoing reasons, there is no valid reason to grant the writ. The Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that three copies of the above and foregoing Brief of Respondent BANK ONE, TEXAS, N.A., in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been forwarded by messenger to Messrs. Robert Hayden Burns and J. Burke McCormick, Butler & Binion, 1600 First Interstate Plaza, 1000 Louisiana, Houston, Texas 77002, and by United States mail, postage prepaid to Ms. Margaret Hewing and to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530 on this 2nd day of February, 1990.

Robert D. Daniel

ROBERT D. DANIEL